

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**NYP HOLDINGS, INC., d/b/a
THE NEW YORK POST**

And

Case No. 2-CA-38209

**LOCAL 94-94A-94b, INTERNATIONAL
UNION OF OPERATING ENGINEERS**

Simon-Jon H. Koike, Esq., Counsel for the
General Counsel
Jordan Lippner & Elliot S. Azoff, Esqs.,
Counsel for the Respondent
Michael J. D'Angelo, Esq., Counsel
for the Union

DECISION

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York City on December 11 and 12, 2007. The charge and the amended charge were filed on April 19 and June 19, 2007. The Complaint was issued on October 26, 2007. In substance the Complaint alleged that the Respondent discharged Ernest Grant because of his union and/or other protected concerted activities. As will be seen below, this case primarily involves bowling balls, bargaining and water coolers.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

I. Jurisdiction

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

NYP Holdings, Inc., publishes the New York Post as a daily general circulation newspaper in the New York metropolitan area. For a very long time and before the present employer acquired this newspaper in 1993, there has been a collective bargaining relationship with nine labor organizations representing various categories of employees. For many years, the Charging Party, Local 94, has represented a unit of operating engineers who perform various tasks within the Bronx plant. Upon acquisition, the Respondent continued to recognize and bargain with Local 94 as well as the other labor organizations. At the time of the events herein, the unit represented by Local 94 consisted of 13 employees.

Until the end of 2006, the Respondent was a member of the Realty Advisory Board, a multi-employer association, through which it maintained a contract with Local 94. The last

RAB/Local 94 contract expired on December 31, 2006. Prior to its expiration, the Respondent decided to engage in direct bargaining with Local 94 and to that end, withdrew from the Association. Bargaining for a new contract to cover the 13 operating engineers began in August or September 2006. The main union representative was its president, Kuba Brown and the
 5 main Company representative was Ken Chiarella. The alleged discriminate, Ernest Grant testified that he attended one of the bargaining sessions but did not participate in the negotiations.¹

10 Not having reached a new contract by December 31, 2006, the parties entered into a series of contract extensions, the last of which was to expire on February 28, 2007. On February 20, 2007, the Company made an offer to Local 94 which it characterized as a final offer. The union's representatives told the Company that they would present the offer to the members but would recommend against its acceptance. The company was notified that if there was no resolution, there would be a strike on March 1, 2007.

15 Anticipating the possibility of a strike, the Company brought in operating engineers from another newspaper that it owed. These people came into the plant, while the Local 94 members were still working, and watched the jobs that had to be done. Soon thereafter, the Company sought to obtain assurances from the other unions that in the event of a Local 94
 20 strike, they would continue to work. According to Chiarella, all the unions except for the NMDU, (representing delivery drivers), assured the Company that their members would go to work. According to Chiarella, as the deadline approached, he felt certain that Local 94 would strike at midnight. He also testified that based on viewing the Union's web site, he saw that Local 94 members were told that in the event of a strike they were to shut off all equipment and lock all
 25 doors and cabinets.

On February 28, 2007 at about 11:00 p.m. the replacements began performing work in the engineering department. At the same time, Ernest Grant, (the alleged discriminate), and Luvenci Bonneau arrived at the plant to start their shift. Instead, they were told by Chiarella that
 30 they were to work in the lobby, monitoring the security television, instead of reporting to their normal jobs. They were told that they could take their normal breaks and that they would be fully paid for the shift. After talking on his cell phone to union representatives, Grant insisted that the two employees were being locked out and Chiarella told them that this was not the case. The two employees waited in the lobby until midnight whereupon Grant got up to leave.
 35 After some give and take, Chiarella stated that if Grant left the building he would be engaging in a strike. (In this regard, there was some testimony by Grant and Bonneau that Chiarella told them that they would be terminated if they left. But this assertion, which is denied by Chiarella, seems to me to be far fetched since he is knowledgeable about labor law and no doubt is aware that strikers can only be replaced but not fired). In any event, Grant and Bonneau decided to
 40 leave the premises whereupon Local 94 set up a picket line at the facility.

The evidence shows that upon setting up the picket line, the drivers represented by NMDU refused to take their trucks out to make deliveries. (Although it was asserted by NMDU representatives that they refused to man the trucks because of safety concerns, it is pretty
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¹ Grant testified that he was an assistant shop steward but there is no evidence that ever acted as a union representative in a grievance situation. Chiarella testified that he was not aware that Grant was an
 50 assistant shop steward.

obvious that they refused in respect for Local 94's picket line). There then ensued a series of conversations between the Company, the NMDU and the permanent arbitrator for that contract which resulted in the arbitrator issuing a cease and desist order based on that contract's no strike clause. When that failed to get the NMDU drivers on the road, the Company agreed, at around 3:30 a.m., to meet further with Local 94. The parties also agreed that Grant and Bonneau would return to work with full pay, that the picket line would be withdrawn and that the NMDU drivers would make the morning delivery of the newspapers. As a consequence of the picket line and the refusal by the NMDU drivers to cross the picket line for about four hours, the Company failed to make delivery of approximately 125,000 papers.

On April 7, 2007, the Company discovered that one of its ink tanks was not sending ink to the presses. When the engineering department employees were trying to clean up the mess, they discovered that two bowling balls had been dropped into the tank which resulted in an obstruction of the lines to the presses. The Company then launched an intensive investigation in an attempt to discover who caused the problem. There is no question but that management was really steamed about what it, (and I), consider an act of sabotage. Moreover, since this area of the plant is visited by the operating engineers, it was suspected that it was one or more members of Local 94 who were responsible. By letter dated April 12, 2007 from Joseph Vincent to Kuba Brown, he stated:

[T]his week we endured a major act of sabotage in an area under the supervision of the Engineer's unit – the ink room. The perpetrator(s) had a working knowledge of the Post's ink tanks. Bowling balls were dropped into both tanks. Given that the tanks operate on gravity, the bowling balls ultimately disrupted operation of the tanks by preventing ink from reaching the presses. Only yeoman work by staff saved the night's production.

The aftermath in terms of clean up of hundreds of gallons of ink and investigation to identify the saboteurs has been and continues to be the focus of my work. I must bring closure to the investigation as quickly as possible. I do not have the time this week or next to consider and cost out proposals which I must do prior to meeting with you. I would suggest that we meet the afternoon of Thursday, April 26th. I truly hope that you will be willing to meet the Post half way in terms of the remaining issues. We do need to achieve a mutually satisfactory solution.

The Company's investigation into the incident failed to discover the culprit or culprits.

On April 18, 2007, Grant and Bonneau had some kind of run in with Lloyd Vasquez, the Director of Security. As a result, Gary Fescine, then the Director of Operations issued a suspension to both employees. However, when Chiarella reviewed the report and interviewed the two employees, he revoked the suspension of Grant.² On April 30, 2007, Grant submitted a letter to the Company stating that he was filing a grievance.

As part of the Company's investigation of the bowling ball incident, it started reviewing security tapes. Serendipitously, a review of the tapes showed Grant removing a water cooler from the facility. The water cooler tape was then brought to the attention of Chiarella and Grant

² Grant had been given a suspension for "menacing glares."

was suspended on May 3 pending an investigatory interview. The reasons for the suspension were not given.

On May 8, 2007, Grant was interviewed by Chiarella in the presence of Steve Grossman, the Security Manager and John Kramer, the Union's business agent. Near the outset of the interview, and before telling Grant that he was being accused of stealing a water cooler, Chiarella asked about the bowling ball incident. And it seems to me that what he was doing was trying to get Grant to admit that he was involved in that incident. When Grant denied that this was the case, Chiarella then started asking, in a somewhat roundabout way, about taking company property out of the building. The bottom line is that Grant volunteered that he had removed a water cooler but asserted that it had been given to him some time ago by his then supervisor, Willie Clavijo. Grant stated that he had kept it at the plant and fixed it up there because he had no room at his home until he recently got another apartment. Grant told Chiarella that he had not sought permission to remove the water cooler because it had been given to him. (Indeed, the photos showed Grant with the water cooler in the presence of a security officer; hardly the actions of a man trying to steal something).

Grant was fired on May 8, 2007 by Chiarella. The reason given was that Grant had stolen company property and had repaired it on company time with company equipment and parts. Chiarella did not check out Grant's story with Clavijo, who no longer worked for the Company. According to Chiarella he did not do so because he did not consider Clavijo a reliable person.

After Grant's discharge, the Union filed a grievance on his behalf. However, the Company refused to arbitrate the grievance because there was no contract in effect at the time.

Contemporaneously with the events involving Grant, the Company postponed a couple of bargaining sessions. On one occasion, (May 3, 2007), Joseph Vincent, the Company's Vice President sent an e-mail to the Union stating *inter alia*;

I am also concerned that the circumstances are not now suitable for effective good faith negotiations. There continue to be problems at the plant from members of you Union. There has been prior sabotage and, in my view, appropriate discipline. However, rather than working cooperatively with me to resolve those matters, you have chosen to file complaints. The misconduct by members of your Union has not stopped. There is an issue that we are investigating now and, to be honest, I cannot be talking with you about a contract at the same time I am attending to matters of misconduct by your members. There are only 24 hours in a day.

With respect to the water cooler incident, the credited testimony of Grant and Clavijo is that at some point the Company decided to stop using all of its water coolers except for the one in the gymnasium. As a consequence, except for the cooler in the gym, Clavijo removed all of the water coolers and put them into the storage area. In 2005 or 2006, Clavijo was instructed to clean out the storage area because new boilers were being installed in that area. Clavijo credibly testified that he was instructed to give away anything in the storage area that employees might want and that Grant chose the water cooler in question. It appears that the other water coolers were thrown away as they had been, for some time, simply discarded surplusage. According to Grant and Clavijo, Grant kept the water cooler in a storage "cage" because he had no room at home. This "cage" is an area where employees sometimes store their personnel belongs. Grant also testified that when he had time, he cleaned the water cooler and credibly testified that other employees did similar things when they were unoccupied.

III. Analysis

5 The General Counsel contends that the Respondent discharged Grant because he engaged in union and protected concerted activity on February 28 and April 18, 2007.

10 The February 28 incident involved the refusal by Grant and Bonneau to accept the lobby assignment for the night shift which was coincident with the picket line and the refusal of the NMDU drivers to make their deliveries.

15 The April 18 incident involved a situation where Grant was called by Bonneau to come downstairs and where he allegedly saw Security Director Vasquez videotaping and interrogating Bonneau. According to Grant, he simply told Bonneau not to worry; to do his job; and that everything would be okay. There is no indication that Grant actually intervened on behalf of Bonneau or that he tried to perform any representational role in the incident. All that one can say about this incident is that Grant apparently gave Vasquez a dirty look and that Vasquez was offended.

20 In essence, the Respondent contends that it did not take any actions against Grant because of his union or protected activity. It contends that it discharged Grant because Chiarella reasonably believed that Grant was stealing company property, (the water cooler), and was caught removing it from the facility.

25 It is my opinion that neither the February 28 or April 18 incidents had anything to do with the decision to discharge Grant. As to the February 28 incident, there is no basis for believing that the Company blamed Grant, (or Bonneau), for the picket line that was established at midnight and the consequential refusal by the NMDU members to do their jobs. If management was angry at anyone, it would have been the NMDU and not Grant. I also do not believe that Grant and Bonneau were threatened with discharge on that occasion. The other incident was
30 also, in my opinion, relatively inconsequential, did not really involve any concerted activity on the part of Grant and Chiarella immediately retracted the suspension that had been given to him.

35 There is, however, no question in my mind that management was extremely angry about the bowling balls being dropped into the ink tank. And I have to agree that this was an act of sabotage.

40 In my opinion, when the Company couldn't determine which individual or individuals were responsible for dropping the bowling balls in the ink tank, Chiarella, out of frustration, was willing to make a scapegoat out of the first Local 94 member who came along and did something that could be a reasonable basis for retaliation. And Grant happened to fit that bill.

45 There can be no doubt that if the Company had concluded that Grant or anyone else had caused the sabotage, it could have discharged that person without any question of liability. But in this case, the Company had no basis for concluding *or even believing* that Grant was responsible, in whole or in part, for putting the bowling balls into the ink tank. At the same time, it is clear that the Company blamed Local 94 and its members generally, for the bowling ball incident. But as the Company could not affix blame to Grant, *on any basis at all*, it follows that the motivation for Grant's discharge can only be because of the fact that he was a member of
50 the Union. That is, it is my opinion, that the Company's motivation in discharging Grant was because he was a member of Local 94 and that he was the convenient scapegoat that allowed the Company to play tit for tat against what it believed to be the Union's act of sabotage.

The Respondent argues that Chiarella's decision to discharge Grant was based on his belief, mistaken or not, that Grant was stealing a water cooler from the Company. But I don't think that this was the case at all. From the way that Chiarella interviewed Grant on May 8, is clear to me that his real purpose was not to talk about the water cooler, but rather to gain information or an admission about the bowling ball incident. Thus, at the outset of the interview, Chiarella didn't ask about the water cooler or even accuse Grant of taking the water cooler. Instead his inquiries were focused on the bowling ball incident, thereby indicating that this was his real point of interest. In short, it is my conclusion that Chiarella was not really concerned about the water cooler, which at that point was just an abandoned appliance, but was using the cooler as a means to talk about bowling balls.

As it is my opinion that the Company's motivation for discharging Grant was not because he took a discarded water cooler out of the facility, and was not because it could be proven or even reasonably suspected that he engaged in the bowling ball incident, I conclude that the only remaining motivation was because he happened to be a member of Local 94.

Conclusions of Law

1. By discharging Ernest Grant because of membership in Local 94-94B International Union of Operating Engineers, the Respondent has violated Section 8(a)(1) & (3) of the Act.

2. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

3. The Respondent has not violated the Act in any other manner.

Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the Respondent illegally discharged Ernest Grant it must offer him reinstatement to his former position of employment or if that position is no longer available, to substantially an equivalent position of employment and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of such refusal less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ³

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, NYP Holdings Inc. d/b/a New York Post, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging Ernest Grant because of his membership in Local 94-94B International Union of Operating Engineers.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Ernest Grant, full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the Remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful action against Ernest Grant and within three days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all

⁴ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

current employees and former employees employed by the Respondents at any time since May 8, 2007.

- 5 (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

10 Dated, Washington, D.C., February 8, 2008.

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Raymond P. Green
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because of their membership in Local 94-94B International Union of Operating Engineers or any other labor organization.

WE WILL NOT in any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL offer Ernest Grant who has been found to have been illegally discharged, immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL make whole Ernest Grant, for the loss of earnings he suffered as a result of the discrimination against him.

WE WILL remove from our files any reference to the unlawful discharge of Ernest Grant and notify him in writing that this has been done and that this action will not be used against him in any way.

NYP Holdings, Inc. d/b/a New York Post

(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.